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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 513

CITIES SERVICE GAS COMPANY,
Petitioner,
VERSUS
WESTERN NATURAL GAS COMPANY,
Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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September, 1964

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Cities Service Gas Company (Cities) respectfully prays that a writ of certiorari issue to review certain portions of the decision and judgment of the Supreme Court of the State of Delaware entered in its Case No. 53, 1962, in the event this Court should grant the petition of Western Natural Gas Company (Western) for a writ of certiorari in No. 408, this Term.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware is reported at 201 A.2d 164 and is printed as Appendix B to the Petition in No. 408, pp. 10a-22a. The opinion and judgment of the Superior Court of the State of Delaware in and for New Castle County are printed as Appendix C to Western's Petition in No. 408, pp. 22a-30a.

JURISDICTION

The opinion of the Supreme Court of Delaware was filed on May 21, 1964. The order overruling Cities' Motion for Reargument (rehearing) was entered on June 5, 1964. The judgment of the Supreme Court of Delaware was entered on June 5, 1964. By order of Mr. Justice Brennan, dated September 1, 1964, Cities was granted until September 18, 1964, in which to file its Conditional Cross-Petition for Writ of Certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The Federal questions were raised by Western as set forth at page 2 of its Petition in No. 408. This Conditional Cross-Petition seeks review of an error of the Supreme Court of Delaware in deciding one of the Federal questions raised by Western.

QUESTION PRESENTED

May a court refuse to require refund of payments made in excess of the effective rate of a natural gas company filed with the Federal Power Commission under the Natural Gas Act upon the ground that such overpayments may have been voluntary payments under state law?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. § 717 are set out in Appendix A to Western's Petition for Writ of Certiorari in No. 408.

STATEMENT OF THE CASE

The pertinent facts are set out in detail in the Statement of the Case in Brief of Respondent Cities Service Gas Company in Opposition filed in No. 408, to which the Court is respectfully referred.

This is a common-law action brought by Cities to recover overpayments made by it to Western under the Kansas Minimum Price Order which this Court held to be void in *Cities Service Gas Co.* v. *State Corporation Comm'n*, 355 U.S. 391 (1958). In defense of the suit Western contended that its effective rate filed with the Federal Power Commission was the 11¢ price fixed in the void Kansas Order rather than the 8¢ price fixed in the contract between the parties. On motions for summary judgment filed by each party, the trial court entered judgment in favor of Cities in the amount of the overpayments.

On appeal, the Supreme Court of Delaware concurred in the views of the trial court that neither the void Kansas Minimum Price Order nor any action of the Federal Power Commission had the effect of increasing the effective rate to the 11¢ level. The Court held:

> "We are accordingly of the opinion that nothing done by the Commission has altered the contract rate or fixed a minimum price of 11¢ for the period within which we are concerned. We also continue to be of the opinion that our Superior Court has jurisdiction to determine this matter.
>
> "The net result is that neither the invalid Kansas regulation nor any action of the Federal Power Commission made any change in the price of 8¢ which

> was accordingly the effective rate throughout the pertinent period. It follows that, had Cities paid only 8¢, Western would have no valid ground to sue for the excess." (Opinion, p. 15a, Appendix B, Petition in No. 408.)

The correctness of this determination is unassailable, as we have demonstrated in our Brief in Opposition filed in No. 408.

Having found that Western's effective filed rate was 8¢ per Mcf under the Natural Gas Act and that Western had received payments in excess thereof, the Court was obliged to affirm the judgment of the trial court ordering refund of the overpayments.[1] This it refused to do. Rather, the Court concluded that equitable considerations under state law (voluntary payments) might justify deviation from Western's filed rate under the Natural Gas Act to permit Western's retention of the overpayments (Opinion, pp. 17a-19a, Appendix B, Petition in No. 408). Accordingly, the case was remanded to the trial court for trial upon the merits.

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[1] The Delaware law is clear that the appellate court is concerned with the judgment rendered by the trial court, not with its reasons therefor. Thus, the fact that the trial court had entered judgment upon Cities' theory of common-law restitution did not affect the obligation of the Supreme Court to affirm the judgment because Western's "filed rate" theory supported it. *Greene* v. *Johnson*, 34 Del. Ch. 115, 99 A.2d 627 (1953); *Maurer* v. *International Re-Insurance Corp.*, 32 Del. Ch. 447, 86 A.2d 360 (1952).

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Western's Petition in No. 408 seeks review of the decision of the Delaware Supreme Court holding that Western's filed rate under the Natural Gas Act was the 8¢ rate fixed by the contract between the parties wholly unaffected by the void Kansas Minimum Price Order.

In Cities' Brief in Opposition filed in No. 408 we have demonstrated that the Delaware court's judgment is not subject to review on certiorari because it is not a final judgment or decree.[2] We have also shown that the Delaware court's determination of Western's effective filed rate is fully supported by the uniform decisions of all of the courts, both state and Federal, which have been based upon the question.[3] The Brief in Opposition prays that Western's Petition for Writ of Certiorari be denied.

Nonetheless, the possibility that a writ of certiorari might be granted dictates that this Conditional Cross-Petition be filed to assure that a review by this Court of the Delaware decision would dispose of this litigation. Accordingly, Cities' Cross-Petition seeks a writ of certiorari in the event Western's Petition in No. 408 is granted.

The Supreme Court of Delaware held that Western's effective filed rate for its sale to Cities under the Natural Gas Act was 8¢ per Mcf. The Court recognized that West-

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[2] Pages 9-12, Brief in Opposition in No. 408.

[3] Pages 12-16, Brief in Opposition in No. 408.

ern had received payments from Cities in excess of that rate. Based upon these determinations, the trial court's judgment should have been affirmed and this litigation should have been at an end.[4]

The decisions of this Court make it quite clear that rates filed with the Federal Power Commission are the *only* legal rates for sales of gas such as these and that such rates *must* be enforced by all courts, state and Federal alike. *Montana-Dakota Util. Co.* v. *Northwestern P.S.C.*, 341 U.S. 246 (1951); *Chesapeake & O. R. Co.* v. *Martin*, 283 U.S. 209 (1930); *Atchison, T. & S. F. R. Co.* v *Harold*, 241 U.S. 371 (1915); *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U.S. 577 (1917); *Louisville & N. R. Co.* v. *Maxwell*, 237 U.S. 94 (1915); *Pennsylvania R. Co.* v. *International Coal Min. Co.*, 230 U.S. 184 (1913).

As to this matter there is no dispute between the parties to this suit. At page 13 of its Petition in No 408 Western affirmatively asserts that its filed rate is the only legal rate. The cases cited by Western stand squarely for the proposition that rates collected in excess of the filed rate must be refunded by a regulated seller.

Notwithstanding the clear and repeated announcements of this Court to the contrary, the Delaware Court refused to enforce Western's filed rate. It held that although Western had no right to the 11¢ payments it had

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[4] At page 11 of its Petition in No. 408, Western asserts that its filed rate covers the entire sale in controversy. The Delaware Court's references to non-jurisdictional sales and periods of time are recognitions of contentions which Western has now abandoned.

received, it nevertheless could retain them if, in fact, the overpayments were voluntary payments as a matter of state law.

In this respect the decision of the Delaware Court directly conflicts with the decisions of this Court. In *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478 (1938), this Court held that equitable considerations generally and the doctrine of voluntary payments specifically could not justify a deviation from the filed rate of a regulated seller. In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942), this Court held that local rules of estoppel could not be permitted to thwart the purposes of Federal statutes.

The conflicting decision of the Supreme Court of Delaware is a serious departure from these well-established principles of Federal law applicable to Federally-regulated commerce. A decision which permits local law to excuse compliance with Federal regulation is a serious threat to the attainment of the objectives of that regulation.[5]

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[5] Let there be no misunderstanding of Cities' position. Cities insists now as it has at all times in the past that it is entitled to recover on the common-law theories of contract and restitution which are alleged in its complaint. Cities asserts that the decision of the Delaware Supreme Court was in error as a matter of state law with respect to contract and restitution. Cities' position is in no way altered by this Conditional Cross-Petition. Here, Cities simply relies upon the age-old principle that where the proof shows that the plaintiff is entitled to recover on an additional ground, it is of no moment that the facts supporting this recovery or the theory for it was supplied by the defendant.

CONCLUSION

For the foregoing reasons, Cities' Conditional Cross-Petition for Writ of Certiorari should be granted in event Western's Petition in No. 408 is granted.

Respectfully submitted,

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